Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In September 1999, the Internal Revenue Service levied on a bank account owned by Petitioner containing $3,389,426.37. The purpose of the levy was to pay federal income taxes, penalties and interest assessed against Elmer W. Cullers, Jr. and Dorothy Cullers. On September 7, 2000, Petitioner filed a complaint against Respondent under 26 U.S.C. §7426 for a wrongful levy. On December 28, 2000, the district court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. §7426. Petitioner then filed a claim under 28 U.S.C. §1346 to recover the funds seized through the levy. When the claim proved unsuccessful, Petitioner filed suit against Respondent to recover the sum of $3,389,426.37 under 28 U.S.C. §1346. On November 22, 2004, the district court dismissed Petitioner's Complaint on the ground that a claim under 26 U.S.C. §7426 is the sole and exclusive remedy for a wrongful levy. Since Petitioner's complaint for a wrongful levy under 26 U.S.C. §7426 had been dismissed earlier due to being time barred, its complaint for a refund under 28 U.S.C. §1346(a) was also dismissed. The Fifth Circuit affirmed the dismissal of Petitioner's complaint under 28 U.S.C. §1346 and held that 26 U.S.C. §7426 is the sole and exclusive remedy for a wrongful levy.

The following question is presented:

May a person who is not the assessed taxpayer utilize 28 U.S.C. §1346 to seek a refund when its funds were seized through a wrongful levy and it had an opportunity to utilize the wrongful levy procedure under 26 U.S.C. §7426?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *E.C. Term of Years Trust v. United States of America*, 434 F.3d 807 (2006) (App. A). The Fifth Circuit affirmed the November 22, 2004 decision of the United States District Court for the Western District of Texas - El Paso Division, reported at 2004 WL 911307 (not reported in the Federal Supplement) (App. B).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court's order was entered on November 22, 2004. The Fifth Circuit's opinion was rendered on January 3, 2006. A petition for a panel rehearing was denied on March 2, 2006 (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 26 United States Code, Section 7426:

(a) Action permitted

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such sevy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may brig a civil action against the

> United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Title 28 United States Code, Section 1346:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Courts [United States Court of Federal Claims], of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws[.]

STATEMENT OF THE CASE

In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, the Internal Revenue Service filed transferee tax liens against Petitioner for the tax liability owed by Elmer W. Cullers, Jr. and Dorothy Cullers.

In 1999, Petitioner, under an agreement with the Internal Revenue Service, deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal

Revenue Service so that it could levy on the account. In September 1999, the IRS levied on the bank account established by Petitioner, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by Elmer W. Cullers, Jr. and Dorothy Cullers.

In September, 2000, Petitioner filed a complaint for a wrongful levy under 26 U.S.C. §7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it was time barred.

Petitioner then sought a refund under 28 U.S.C. §1346 and on September 5, 2003, filed a complaint for a refund of the $3,389,426.37. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. §7426 and dismissed Petitioner's Complaint for a Refund under 28 U.S.C. §1346.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527, 530 (1995) and the Court of Appeals for the Ninth Circuit's holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th. Cir. 1995). In its opinion, the Fifth Circuit distinguished the holding in *United States v. Williams* from the facts of this case and rejected the holding in *WWSM Investors v. United States* even though it sanctioned the use of 28 U.S.C. §1346 when the taxpayer also had the opportunity to use 26 U.S.C. §7426. The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. §7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of Petitioner's Complaint for a Refund under 28 U.S.C. §1346.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE NINTH CIRCUIT REGARDING WHETHER 26 U.S.C. §7426 IS THE EXCLUSIVE REMEDY FOR A WRONGFUL LEVY AND TO CONFIRM THE SCOPE OF 28 U.S.C. §1346 AS INTERPRETED IN *WWSM INVESTORS v. UNITED STATES*, 64 F.3d 456 (9th Cir 1995) TO PREVENT CONFLICTS BETWEEN CIRCUIT COURTS OF APPEAL.

A. A conflict exists between the Fifth Circuit and the Ninth Circuit regarding whether 26 U.S.C. §7426 is the exclusive remedy for a wrongful levy.

This case involves the issue of whether a third party (Petitioner) who pays the taxes assessed against other taxpayers (Elmer W. Cullers, Jr. and Dorothy Cullers) under a wrongful levy can avail itself of the refund provisions of 28 U.S.C. §1346 when it had an opportunity to avail itself of the wrongful levy procedure under 26 U.S.C. §7426.

The Ninth Circuit Court of Appeals has held that 26 U.S.C. § 7246 is not the exclusive remedy for a wrongful levy under facts very similar to this case. *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir 1995). *WWSM Investors* involved a levy of a bank account as opposed to a payment to the Internal Revenue Service to remove a tax lien as was the case in *United States v. Williams*. WWSM Investors filed its complaint under 26 U.S.C. §7426 more than nine months following the levy. The district court denied WWSM leave to amend its complaint to set forth a claim for a refund under 28 U.S.C. §1346. The district court then dismissed the case on the grounds that 26 U.S.C. §7426 was the exclusive remedy and that the court lacked subject matter jurisdiction because the claim was time barred.

The Ninth Circuit reversed the case and held that WWSM Investors had a separate cause of action for a refund under 28 U.S.C. §1346. In concluding that 28 U.S.C. §1346 is available to a taxpayer who had an opportunity to utilize 26 U.S.C. §7426, the Ninth Circuit relied upon this Court's holding in *United States v. Williams*, 514 U.S. 527, 530 (1995). The Ninth Circuit refused to recognize any distinction between the fact that a lien was involved in *United States v. Williams* while a levy was involved in *WWSM Investors*. The Court was also not persuaded to limit the holding in *United States v. Williams* to fact situations where the taxpayer bringing a refund action under 28 U.S.C. §1346 could not have filed a wrongful levy action under 26 U.S.C. §7426. In essence, the Ninth Circuit in *WWSM Investors* found that 26 U.S.C. §7426 was not the exclusive remedy available to a third party who paid the taxes of another assessed taxpayer and who had an opportunity to use 26 U.S.C. §7426. The Ninth Circuit's holding in *United States v. Williams* stands for the proposition that the language in 28 U.S.C. §1346 encompasses third party refund claims even when the taxpayer had the opportunity to use 26 U.S.C. §7426.

The Ninth Circuit Court of Appeals also spoke on the exclusivity issue in *Fidelity and Deposit Company of Maryland v. City of Adelanto*, 87 F.3d 334 (9th Cir. 1996). This case involved a notice of levy served on the City for money owed to a third party. Fidelity and Deposit contested the levy but not through the use of 26 U.S.C. §7426. The district court dismissed the case partially on the grounds that the 26 U.S.C. §7426 was the exclusive remedy and that, based on the facts, such an action was time barred. In its opinion, the Ninth Circuit stated: "Thus, to the extent that a refund action is available, Section §7426 is not the exclusive remedy for a wrongful levy and to this extent, *Winebrenner* has been overruled by *Williams*." *Fidelity and Deposit Company of Maryland* at 338.

B. The scope of 28 U.S.C. §1346 as interpreted in *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir. 1995) should be confirmed to prevent conflicts between Circuit Courts of Appeal.

26 U.S.C. §7426 of the Internal Revenue Code constitutes a grant of jurisdiction and a waiver of sovereign immunity. It enables a third party to sue the government for relief in federal district court, whether or not property has actually been seized. 26 U.S.C. §7426 (b). It is a pre-deprivation remedy. 26 U.S.C. §7426 was added to the Internal Revenue Code by the Federal Tax Lien Act of 1966.

In the pre-26 U.S.C. §7426 era, Federal courts permitted third parties to restrain wrongful levies; *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ulmman*, 110 F.2d 590 (3d Cir. 1940); and to obtain declaratory judgments on rights to property; *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962). Federal courts also permitted third parties to recover money wrongfully taken even if deposited with the Treasury Department. *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709 (9th Cir. 1948); *Karno-Smith Co. v. Maloney*, 112 F.2d 690 (3d Cir. 1940); *Szerlip v. Marcelle*, 136 F. Supp. 862 (DC N.Y. 1955); *Colorado Milling & Elevator Co. v. Glenn*, 118 F. Supp. 943 (DC. Ky. 1954). During this period, the government often contended that third parties seeking a return of funds from the IRS were subject to the refund procedure in the Internal Revenue Code. *United States v. Worley*, 213 F.2d 509 (6th Cir. 1954).

Prior to the decision in *United States v. Williams*, the dominant judicial view was that 26 U.S.C. §7426 was the exclusive remedy available to a third party to contest a

wrongful levy. The lead case was *United Sand and Gravel Contractors, Inc. v. United States*, 624 F.2d 733 (5th Cir. 1980). In that case, a subcontractor claimed an interest in funds due to the prime contractor that had been seized by the IRS to satisfy the prime contractor's liability. The subcontractor filed suit under the Quiet Title Act (28 U.S.C. §2410), which provided for a six-year statute of limitations. The government's motion to dismiss was granted based on lack of subject matter jurisdiction. The Fifth Circuit held that the subcontractor's exclusive remedy was to file a wrongful levy action under 26 U.S.C. §7426, which was no longer possible because more than nine months had elapsed since the levy.

Prior to *United States v. Williams*, the only case with a holding in opposition to the holding in *United Sand and Gravel Contractors, Inc.* was *Gordon v. United States*, 649 F.2d 837, 47 AFTR 2d 81-1503 (Ct. Cl. 1981). The Court of Claims opined that Section 7426 was intended solely to expand the availability of third party relief in federal district courts and rejected the contention that it was the exclusive means of seeking relief in third party levy cases.

In *United States v. Williams*, the issue was whether a third party (Ms. Williams) who paid the tax assessed against another person (her former husband) to remove a tax lien could pursue a tax refund under 28 U.S.C. §1346. The United States made three critical arguments:

1. Ms. Williams was not a taxpayer and, therefore, could not pursue a refund;

2. Allowing third party refund suits would render 26 U.S.C. §7426 superfluous because, prior to

26 U.S.C. §7426, third parties were unable to sue the government directly;

3. Allowing third party refund suits would frustrate collection efforts against the primary obligor.

This Court rejected these arguments and held that 28 U.S.C. §1346 did not limit refund jurisdiction to assessed taxpayers but included third persons who actually paid the taxes. This Court also noted that 28 U.S.C. §1346 codified the common law *assumsit* action that third parties had historically brought against the tax collector to recover money erroneously collected. This Court also found that, since no levy had been served on Ms. Williams, Section 7426 was not available to her in any event. However, of primary importance to this case, this Court also held that the use of 28 U.S.C. §1346 by Ms. Williams would not render superfluous other actions such as wrongful levy. *United States v. Williams* at 538. The Court noted that 28 U.S.C. §1346 is a post-deprivation remedy and is available only when the third party has paid the government in full. Conversely, a wrongful levy action is a pre-deprivation remedy and is available even if the property in question has not been surrendered. *United States v. Williams* at 539. The holding in *United States v. Williams* clearly stands for the proposition that 26 U.S.C. §7426 is not the exclusive remedy available to a third party who pays the tax liability of another assessed taxpayer.

In *United States v. Williams*, this Court held that a third party was a taxpayer for the purposes of seeking a refund under Section 1346 and rejected the government's argument that, at the time 26 U.S.C. §7426 was enacted, no other remedies were available to nontaxpayers. While this Court

noted the fact that Ms. Williams could not have brought a wrongful levy action, that fact was not the basis for the holding. This Court never stated that its holding was based on the non-availability of a wrongful levy remedy. Interestingly, neither the courts nor the Internal Revenue Service appear to have ever taken the position that an assessed taxpayer is precluded from pursuing a refund simply because the overpayment arose through a levy. Arguing that a different set of rules applies to third parties who pay, is tantamount to arguing that the distinction between assessed taxpayers and third party taxpayers struck down by *United States v. Williams* is still alive and well.

The District Court, in its Order[1], conceded that this Court's holding in *United States v. Williams* rejected the law of the Fifth Circuit (District Court's Order, p. 4 - see Appendix) and stated the holding in *United States v. Williams* would have required a different result in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987) on the issue of standing. However, the district court chose to dismiss Petitioner's complaint for a refund by concluding that the holding in *United States v. Williams* ". . . establishes an equitable exception for those who cannot otherwise avail themselves of pre -deprivation remedies." (District Court's Order, p. 7). The equitable exception found by the District Court is based on the rationale set forth in the dissent in *United States v. Williams*. However, in *United States v. Williams* this Court was faced with similar arguments and rejected them in fashioning its holding. The government first tried to convince the Court that a third person who paid the taxes of the assessed person was not a taxpayer. That argument was

1. The Order issued by the United States District Court of the Western District of Texas, El Paso Division, dated November 22, 2004, is attached hereto in its entirety in the appendix.

rejected outright. *United States v. Williams* at 535. The government also argued that if Section 1346 could be used by someone like Williams, the levy, quiet title, and separate fund remedies would become superfluous. The Court noted that Section 1346 is a post-deprivation remedy that is available only if the government has been paid in full. *United States v. Williams* at 538. The other remedies, including wrongful levy, are pre-deprivation remedies and do not depend on surrender of the property in question. *United States v. Williams* at 538. The government also argued that allowing Williams to sue would lead to widespread abuse. This Court rejected that argument also. *United States v. Williams* at 540.

A fair reading of *United States v. Williams* does not result in the conclusion that its holding is limited to its facts. This Court put to rest this issue of whether a third person who pays the tax of another person is a taxpayer. This created standing for third persons who paid the taxes of an assessed person. The Supreme Court also plainly acknowledged the "evident breadth of §1346 (a) (1) . . ." in dealing with the governments arguments. *United States v. Williams* at 532. This Court determined that 28 U.S.C. §1346 is another way for a third person who pays the full tax of an assessed person to seek the return of the funds paid. In its holding, this Court implicitly determined that 26 U.S.C. §7426 does not provide the exclusive remedy to a taxpayer. While 26 U.S.C. §7426 may be utilized to recover taxes seized by a wrongful levy, 28 U.S.C. §1346 may also be utilized by a third party who has paid the full amount of the taxes due. There is no language in 26 U.S.C. §7426 that can reasonably be seized upon to conclude that it precludes a taxpayer from using 28 U.S.C. §1346 if he or she has followed the procedures for a refund. The use of the "equitable exception" construct flies in the face of the holding in *United States v. Williams* and continues

the now rejected notion that exclusivity was intended when there is a complete absence of such language in 26 U.S.C. §7426.

In the final analysis, this Court should recognize that 26 U.S.C. §7426 is a pre-deprivation remedy and 28 U.S.C. §1346 is a post-deprivation remedy. These statutes were enacted to serve different purposes. There is no coherent rationale for concluding that 26 U.S.C §7426 and 28 U.S.C. §1346 cannot be available as alternative remedies. It should not matter that 26 U.S.C. §7426 could have been used as long as the taxpayer can avail itself of 28 U.S.C. §1346.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 3, 2006

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 05-50068

EC TERM OF YEARS TRUST,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

EC Term of Years Trust ("the Trust") appeals from the district court's dismissal of its refund claim under 28 U.S.C. § 1346. The district court held that because the Trust's sole and exclusive remedy lay in a wrongful levy action under 26 U.S.C. § 7426, the Trust's refund claim must be dismissed for lack of subject matter jurisdiction. Appellant now argues that the district court erred when it determined that § 7426 was the exclusive remedy available to the Trust.

Appendix A

After assessing federal income taxes, penalties, and interest against Elmer and Dorothy Cullers, the Trust's creators, the Internal Revenue Service ("IRS") filed transferee tax liens against the Trust for the Cullers's tax liability. Ultimately, the IRS seized the total amount owed from an account created by the Trust for the purpose of dispatching the Cullers' debt. The Trust then sought to recover the funds under 26 U.S.C. § 7426(a)(1)[1] and 28 U.S.C. § 1346(a)(1)[2]. Because the Trust brought suit after the statute of limitations had run on the wrongful levy action under § 7426, *see* 26 U.S.C. § 6532(c)(1) (providing a 9 month statute of

1. 26 U.S.C. § 7426(a)(1) provides:

> If a levy has been made on property or a property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which the levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

2. 28 U.S.C. § 1346(a)(1) provides:

> The district courts shall have original jurisdiction . . . of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

limitations for suits brought under § 7426), the district court dismissed that claim for lack of subject matter jurisdiction.[3]

The Trust then brought suit a second time, again seeking a refund under § 1346(a)(1). After determining that the earlier decision had not been a decision on the merits for the purposes of *res judicata*, the district court directly addressed the question of whether a wrongful levy claim under § 7426 remained the "sole and exclusive" remedy for third parties such as the Trust in light of the Supreme Court's decision in *United States v. Williams*, 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995), which allowed a third party who had removed a lien on her property by paying the tax liability of another individual to bring a refund action under § 1346(a)(1). In a well-reasoned opinion, the district court distinguished *Williams* and held that a wrongful levy action

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3. Because the statute of limitations had lapsed on the § 7426 claim, the government had not waived its sovereign immunity, thus precluding suit. *See Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); *Bank One Texas v. United States*, 157 F.3d 397, 403 (5th Cir.1998) (discussing a statute of limitations as a "condition" to the waiver of sovereign immunity). The district court also dismissed the claim under § 1346, noting that § 7426 was "the *exclusive* remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *Tex. Commerce Bank Fort Worth, N.A. v. United States*, 896 F.2d 152, 156 (5th Cir.1990) (citing *United Sand and Gravel Contractors v. United States*, 624 F.2d 733, 739 (5th Cir.1980)). Because the district court held that § 7426 was the only remedy available to the Trust, the government had not waived sovereign immunity under § 1346 either.

remained the exclusive remedy for the Trust and dismissed the Trust's complaint for lack of subject matter jurisdiction. The Trust now appeals. We review a dismissal for lack of subject matter jurisdiction *de novo*. *Bank One Texas*, 157 F.3d at 403.

This appeal presents the straightforward question of whether a wrongful levy action under § 7426 is the "exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *See Tex. Commerce Bank*, 896 F.2d at 156. This court historically has held that if § 7426 is available to an individual, then it is his sole and exclusive remedy. *See id.*; *United Sand and Gravel Contractors*, 624 F.2d at 739 ("When someone other than the taxpayer claims an interest in property or rights to property which the United States has levied upon, his exclusive remedy against the United States is a wrongful levy action under I.R.C. § 7426."); *see also Oxford Capital Corp. v. United States*, 211 F.3d 280, 289 (5th Cir.2000) (Dennis, J., concurring) ("[A] wrongful levy action under section 7426 is the exclusive remedy of a third person whose property has been seized without probable cause of a nexus between the property and the tax debtor."). § 7426 reflects the government's strong interest in resolving "doubts concerning the status of the taxpayer's account swiftly." *United Sand and Gravel Contractors*, 624 F.2d at 739. The short statute of limitations governing claims under § 7426 allows for the expeditious resolution of tax liability. *See Gordon v. United States*, 227 Ct.Cl. 328, 649 F.2d 837, 844 (1981) (reviewing the legislative history of the nine month statute of limitations under § 6532(c)).

Appendix A

Appellant now argues that the Supreme Court's decision in *Williams* has altered the landscape of recovery actions against the IRS and allows litigants to bring a refund action under § 1346, even if § 7426 was available to them. In *Williams*, the Supreme Court held that § 1346 authorized a refund suit by a third party who had paid a tax under protest to remove a federal tax lien from her property. 514 U.S. at 529, 115 S.Ct. 1611. The Court parsed the language of § 1346 and determined that the "provision does not say that only the person assessed may sue," and thus did not speak directly to the issue of whether a third party could bring suit under § 1346. *Id.* at 531, 115 S.Ct. 1611 (emphasis added). Ultimately, the Court determined that Williams had standing to sue under § 1346. *Id.* at 540, 115 S.Ct. 1611.

We disagree with appellants that *Williams* must be read to allow litigants who could bring suit under § 7426 *also* to bring suit under § 1346. The *Williams* decision does not suggest that a refund action under § 1346 is available *in addition* to a wrongful levy action under § 7426. The Supreme Court specifically noted that Williams could not have brought a claim under § 7426, and would have wholly lacked a remedy in the absence of a claim under § 1346. *Williams*, 514 U.S. at 536, 115 S.Ct. 1611. Indeed, the Court noted that by authorizing "*some* third-party suits . . . the levy . . . remed[y does not] become superfluous." *Id.* at 538, 115 S.Ct. 1611 (emphasis added). The *Williams* opinion can fairly be read to apply when a remedy under § 7426 is unavailable, a situation that does not exist in the instant case. To construe *Williams* to allow an alternative remedy under § 1346, with its longer statute of limitations period, *see* 26 U.S.C. §§ 6511(a), 6532(a)(1), would undermine the surety provided by the clear avenue to recovery under § 7426.

Appendix A

In the wake of *Williams*, several of our sister circuits have maintained that § 7426 is the exclusive remedy for third party wrongful levy claims. *See Dahn v. United States*, 127 F.3d 1249, 1253 (10th Cir.1997) (holding that *Williams* did not "overturn, sub silentio, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy"); *see also Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 352 (3d Cir.2000) (discussing the exclusivity of the remedy available to third parties for wrongful levies under § 7426); *Miller v. Tony and Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir.1998) ("Section 7426(a)(1) is the exclusive remedy of third parties who seek to assert claims on IRS-levied property."); *Audio Investments v. Robertson*, 67 Fed.Appx. 795, 797 (4th Cir.2003) (per curiam) (unpublished) ("An action for wrongful levy under [§ 7426] is the exclusive means for challenging a levy on property that 'does not . . . belong to the taxpayer against whom the levy originated.' "). The only exception is the Ninth Circuit, which has permitted third parties whose bank accounts were levied to bring refund actions under § 1346. *See WWSM Investors v. United States*, 64 F.3d 456, 458-59 (9th Cir.1995). *But see Fidelity & Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334, 335 (9th Cir.1996) (holding that "where suit is by a nontaxpayer third party and § 7426(a)(1) applies, and the alternative basis proffered for waiver of sovereign immunity is an action to quiet title under § 2410(a)(1) . . . § 7426 is the exclusive remedy.").

We conclude that the Supreme Court's decision in *Williams* does not alter our long-standing rule regarding the exclusivity of the remedy available under § 7426. *See United Sand and Gravel Contractors*, 624 F.2d at 739. Therefore,

we follow our prior holdings that when § 7426 is available to an individual, then it is his sole and exclusive remedy.

Accordingly, we AFFIRM the district court's decision to dismiss for lack of subject matter jurisdiction.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION DATED AND FILED NOVEMBER 22, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-03-CA-363(KC)

EC TERM OF YEARS TRUST,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

ORDER

In its Order denying defendant's motion to dismiss the present complaint on res judicata grounds (Doc. No. 13), this Court ordered that plaintiff show cause why the complaint on a tax refund should not be dismissed for failure to pursue a wrongful levy claim.

Familiarity with this Court's prior Order is presumed. This Court's jurisdictional concern, as properly identified by plaintiff, centers on the interaction of two cases, *United States v. Williams*, 514 US 527 (1995), and *Texas Commerce Bank-Fort Worth, NA v. United States*, 896 F.2d 152 (5th

Cir. 1990), and the reasoning articulated in *Dahn v. United States*, 127 F.3d 1249 (10th Cir. 1997). Plaintiff in its response, argues that *Williams* "created a rationale for abandoning a strict application of the exclusivity rule in all cases and giving effect to the plain language in § 13[4]6(a) where necessary to give effect to the ends of justice." Pl.'s Resp. at 2. Plaintiff further argues that as his wrongful levy case was dismissed for lack of subject matter jurisdiction, a preclusion on exclusivity of remedies is not implicated as the merits of the claim were not litigated. Plaintiff further identifies *WWSM Investors v. United States*, 64 F3d 456 (9th Cir. 1995) (declining to limit *Williams* to its facts) as requiring a contrary outcome than proposed in the present case.

Plaintiff's original action involved a wrongful levy claim brought pursuant to § 7426 and 28 U.S.C. § 1346(a)(1). The Court in that case dismissed the complaint filed almost one year after the date of the levy and concluding that it was barred by § 6532(c)(1). The present action involves a claim for refund brought pursuant to 26 U.S.C. § 6511 and alleges jurisdiction premised on 28 U.S.C. § 1346(a). Complaint ¶¶ 3,4. On September 6, 2001, plaintiff filed a claim for refund of the deficiency, which claim was denied. *Id.* ¶ 12. The claim undisputedly involves the same funds taken through the 1999 levy addressed in the prior action, *id.* ¶ 6.

Prior to the Supreme Court's decision in *Williams*, it was beyond dispute that "[s]ection 7426(a)(1) . . . affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *Texas Commerce Bank-Fort Worth, NA*, 896 F.2d at 156 (citing *United Sand & Gravel Contractors v. United*

States, 624 F.2d. 733, 739 (5th Cir. 1980)). The Fifth Circuit was not alone in holding that a claim for wrongful levy rather than for a refund was the exclusive remedy. *See, e.g., United States v. Williams*, 947 F.2d 37, 39 (2d Cir. 1991)("[t]he sole remedy available to an individual . . . who claims an interest in property that has been levied upon by the IRS for the purpose of satisfying the tax liability of another person, is a wrongful levy action asserted under 26 U.S.C. § 7426(a)(l)"); *see also Winebrenner v. United States*, 924 F.2d 851, 854-55 (9th Cir. 1991)(same); *Trust Co. of Columbus v. United States*, 735 F.2d 447, 448 (11th Cir. 1984)(same).

Under similar facts involving a wrongful levy in *United Sand and Gravel Contractors*, the Fifth Circuit rejected the plaintiff's attempt to seek an alternative remedy for a wrongful levy in 28 U.S.C. § 2410. The Court noted that "[t]he wrongful levy action under . . . [§] 7426 fits the present case like a glove. . . . United Sand failed to file a timely claim, and thus cannot avail itself of this remedy." *United Sand & Gravel Contractors*, 624 F.2d. at 739 (internal quotation marks omitted). As the available remedy dovetailed neatly with the facts of the case, the Court concluded that

> several of United Sand's theories would make meaningless the nine month limitation contained in [26 U.S.C. §] 6532(c). . . . Because we do not believe Congress intended its provision to be meaningless, and because we hold that [26 U.S.C. §] 7426 is the exclusive remedy against the United States for parties other than taxpayers complaining that their property has been wrongfully levied upon, we affirm the decision below.

United Sand & Gravel Contractors, 624 F.2d. at 739-40. In so stating, the Fifth Circuit held that one entitled to bring a wrongful levy action was in fact obligated to do so.

The Supreme Court decision in *United States v. Williams*, 514 US 527 (1995), cast some doubt on the exclusivity of the wrongful levy remedy. *Williams* involved a lien by the Internal Revenue Service on a home jointly owned by husband and wife. *Id.* at 529. While the lien was against the husband who had incurred the tax liability giving rise to the lien, the husband's interest in the home was transferred, without notice of the existing lien, to the wife as part of a division of assets in divorce proceedings. *Id.* at 529-30. Although the wife was not personally liable, she paid the tax liability under protest to remove the lien, which had been in place for approximately fifteen months, from the property for purposes of selling the home. *Id.* at 530. She then sued for a refund under 28 U.S.C. § 1346(a)(1), which constitutes a waiver of sovereign immunity suit in "[a]ny civil action . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." *Williams*, 514 U.S. at 530 (internal quotation marks omitted).

The issue before the Court in *Williams* was "whether . . . [an individual] who paid a tax under protest to remove a lien on her property, has standing to bring a refund action under 28 U.S.C. § 1346(a)(1), even though the tax she paid was assessed against a third party." *Id.* at 529. The Court held that "respondent has standing to sue for a refund . . . [as] only a strained reading of other relevant provisions would bar her suit. She had no realistic alternative to payment of a tax she did not owe, and we do not believe Congress intended

to leave parties in respondent's position without a remedy." *Id.* In so holding, the Supreme Court rejected the law of this Circuit, *see Snodgrass v. United States*, 834 F.2d 537, 539-40 (5th Cir.1987), which would have required a contrary result on the question of standing.

The Court of Appeals for the Ninth Circuit thereafter applied *Williams* in denying earlier precedent embracing the exclusivity of the wrongful levy cause of action and permitting the plaintiff to amend its complaint to include a claim for refund pursuant to § 1346(a)(1). *WWSM Investors*, 64 F3d at 458. The majority opinion dismissed, as exalting form over substance, the government's argument that the facts of Williams involved a lien whereas the facts before it involved a levy. *Id.* ("seizing money from WWSM's bank account is functionally equivalent to what the IRS did in *Williams*—placing a lien on property in escrow under circumstances which compelled Mrs. Williams to pay the IRS and discharge the lien. In both cases, the IRS extracted money by compelling one person to pay the tax of another"). The dissenting opinion rejected the majority's dismissal of the argument, concluding that

> In *Williams*, the Supreme Court recognized that Williams could not use the remedy of 26 U.S.C. § 7426 because there was no levy. See 514 U.S. at __, 115 S. Ct. at 1618. *Williams* involved an IRS assessment for certain tax liabilities. A lien, not a levy, was placed on the property. The taxpayer paid the tax liability to remove the lien so the property could be sold and sued the IRS for a refund.

Appendix B

> The Supreme Court recognized *Williams* as a refund, not a wrongful levy, case, and analyzed the non-levy remedies available: quiet title (§ 2410(a)(1)); separate-fund (§ 6325(b)(3)); and refund (§ 1346(a)(1)). *Id.* 514 U.S. at __-__, 115 S. Ct. at 1618-1620 (Parts IV and V of the opinion). The Supreme Court never mentioned . . . *United Sand and Gravel v. United States*, 624 F.2d 733 (5th Cir.1980), nor did it overrule or even hint that § 7426 was not the exclusive remedy for a claimed wrongful levy. Quite the contrary, the Supreme Court analyzed the various remedies for the various situations, 514 U.S. at __, 115 S. Ct. at 1619, and did not allow that a non-levy remedy under § 1346(a)(1) was available when the exclusive levy remedy under § 7426 was barred by the statute of limitations.
>
> WWSM's only remedy was under § 7426 because this case . . . involves a wrongful levy; *Williams* did not.

WWSM Investors, 64 F3d at 459-60 (Brunetti, J., dissenting).

In *Dahn v. United States*, 127 F.3d 1249, the Tenth Circuit Court of Appeals addressed the exclusivity rule in light of *Williams*. The Court made two observations relevant to the exclusivity of the wrongful levy remedy.

> First, there were no tax levies involved in that case. Thus, the Court was concerned solely with the reach of § 1346 *per se*; the exclusivity of a

> concurrent § 7426 claim was never in issue. Indeed, the Court specifically emphasized the inapplicability of § 7426 (or any other meaningful remedy) to reinforce its broad reading of § 1346. *See Williams*, 514 U.S. at 536,115 S. Ct. at 1617. There is no indication that the Court intended to reach beyond the confines of the case before it and overturn, *sub silentio*, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy.

Id. at 1253. and

> Second, and in any event, David Dahn clearly does not fall within the exceptional category exemplified by the plaintiff in *Williams*. He did not deliberately and affirmatively proffer payment for the tax liabilities of his parents to obtain the prompt release of property encumbered therefor; he was simply a passive, collateral subject of IRS collection activities. If *Williams* were applicable to this case, anyone claiming financial losses tied to the collection of someone else's taxes could arguably be a "taxpayer" entitled to seek a "refund"—perhaps long after the remedy specifically devised for the situation by Congress had expired. We decline to extend *Williams* in this imprudent and implausible manner.

Id. at 1254.

Appendix B

Given the foregoing, the holding in *Williams may* be read as *requiring* two possible conclusions in light of the prior law of this Circuit holding that a wrongful levy claim is the exclusive remedy for an aggrieved third party. The first possible conclusion, as pointed out by the *WWSM Investors* majority, would be that it matters little how the third-party claim arises or whether a pre-deprivation was available. Once *a* payment of the taxes of another is made under protest, the payor satisfies the definition of taxpayer under § 1346 and the payor may pursue a refund. *Fidelity and Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334, 338 (9th Cir. 1996)("to the extent that a refund action is available, § 7426 is not the exclusive remedy for a wrongful levy"); *Beauchamp v. United States*, 4 F. Supp. 2d 213, 216 (W.D.N.Y. 1998)(noting that "the 'lien vs. levy' distinction advanced by the IRS is not relevant" but further noting that plaintiff in that case was subject to tax and therefore may not be characterized as third party for purposes of wrongful levy action).

The second possible conclusion is that the decision is limited to standing to pursue a refund in the absence of pre-deprivation remedies and therefore has no bearing on the continued viability of the exclusivity rule. *Compagnoni v. United States*, NO. 94-0813-CIV, 1996 WL 636110, at *9 (S.D. Fla. Aug. 30, 1996) (agreeing with "*WWSM dissent*, and conclud[ing] that a taxpayer who—through inadvertence or otherwise—ignores the statute of limitations and relinquishes an otherwise available and satisfactory remedy under section 7426 cannot instead seek relief under section 1346 with its substantially more generous limitations period. . . . [A]ccepting this conclusion would render the rigid

limitations period of section 7426 a virtual nullity and defeat the Congressional goal of ensuring the prompt resolution of wrongful levy claims against the United States"); *see also United Sand and Gravel Contractors, Inc.*, 624 F.2d at 738 (discussing potential for alternative remedy and noting "the intent of Congress to set a short time limit for wrongful levy actions will be completely undercut"). While the conferral of standing to bring such a claim may be read as applying to taxpayers, the conferral of standing does not necessarily require the conclusion that the application of other legal standards, for example statutes of limitations, would not otherwise preclude a favorable outcome on the same claim.

Faced with these two potential readings of the effect of *Williams*, this Court is inclined to adopt the latter. The Supreme Court in *Williams* noted that the plaintiff in that case was otherwise without a realistic remedy. *Williams*, 514 U.S. at 536. Noting the substantial exposition of the facts of the case, the dissent notes that the majority "outlines in some detail what it conceives to be the equities of respondent's situation—a factor not usually of great significance in construing the Internal Revenue Code." *Id* at 542 (Rehnquist, C.J., dissenting). As a result, the majority's determination is inextricably linked to the facts of the particular plaintiff.

> This consequence reinforces our conclusion that Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is. Though the Government points to three other remedies, none was realistically open to Williams. Nor would any of

> the vaunted remedies be available to others in her situation.

Id. at 536. As such, this Court, in reconciling the long-standing exclusivity rule and the later Supreme Court decision in *Williams*, is inclined to conclude that *Williams* establishes an equitable exception for those who cannot otherwise avail themselves of pre-deprivation remedies. The facts of the present case, specifically the failure to bring a timely wrongful levy action when notice of the government action is not an issue, does not rise to the level of the facts before the Supreme Court in *Williams*.

This Court cannot read *Williams* as obliterating the requirement that third-parties, under ordinary circumstances, are no longer required to bring a wrongful levy action as such would create instability in federal government property resolutions inherent in the shortened statute of limitation applicable to such claims and would render the cause of action superfluous. While the causes of action is clearly a pre-deprivation remedy in contrast to the post-deprivation remedy of claims for refunds, the issue inherent in both is identical: the possessory interest of the federal government in funds derived from the levy. *Williams* does not sanction a revisitation of a singular issue in separate proceedings, nor does it favor those who fail to act within the applicable statute of limitations.

In light of the continued viability of this Circuit's law establishing wrongful levy as the exclusive remedy for those in plaintiff's circumstances, plaintiff may not avail itself of an applicable waiver of sovereign immunity for its present claim. Plaintiff's complaint is therefore dismissed.

Appendix B

Defendant's renewed motion to dismiss or in the alternative for summary judgment (Doc. No. 16) is **denied as moot**. The Clerk shall close the file.

SO ORDERED.

Dated at El Paso, Texas, November 22, 2004.

s/ Kathleen Cardone
Kathleen Cardone
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 2, 2006

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-50068

EC TERM OF YEARS TRUST

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

ON PETITION FOR REHEARING

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge